Introduction.

The Dutch legal system makes a distinction between employees and public servants. Employees are employed on the basis of an employment contract as referred to in Part 10, Book 7 of the Civil Code (Burgerlijk Wetboek). The legal position of public servants is based on Section 1 (1) of the Public Service Act (Ambtenarenwet).

Public servants are, by definition, employed by the government organizations. However, non-public servants may also be employed by government organizations. A government organization may (under certain circumstances) opt to employ (a part of) its employees on the basis of a civil-law employment contract. In common parlance these employees are referred to as “persons on civil employment contracts”. In the case of transfer of undertaking, the provisions of Section 7:662 et seq. of the Civil Code apply to these employees.

The consequences for the rights of employees in the Netherlands of a transfer of undertaking are governed by European law. Of particular importance is Directive 77/187 of the European Community of 14 February 1977, relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. The Directive dating from 1977 has since been replaced by Directive 98/50 of 29 June 1998 and most recently by Directive 2001/23 of 12 March 2001 (OJEC of 22 March 2001, L82/16). The Directive dating from 1977 has been renumbered and a number of points in it have been clarified (partly in response to the case law of the Court of Justice of the European Communities), but it has not been substantively amended in the two newer directives.  

The Directive was implemented into Dutch law for employees by Sections 7:662 to 7:666 inclusive of the Civil Code and a few other laws. The provisions provide, put briefly, that all rights and obligations in respect of employees are transferred from the transferor employer to the transferee employer. For example, the employees may not be dismissed and they retain all their rights arising from the employment contract or employment relationship with the transferor employer. As indicated above, these provisions also apply to persons on civil employment contracts who are employed by government organizations.

The Directive has not been implemented into Dutch law for public servants in a manner comparable to Sections 7:662 to 7:666 inclusive of the Civil Code. The legislator has expressly opted not to do so. The question which then arises is whether the protection of the Directive does not as yet apply to public servants via the direct effect of the Directive.

The Directive applies in the case of transfer of an undertaking pursuant to agreement or merger (Article 1 (1a and 1b) of the Directive). The Directive further protects employees (Article 2, (1d and 2) of the Directive).

1 The directives dating from 1977, 1998 and 2001 are hereinafter jointly called “the Directive”.
2 Parliamentary Documents (Kamerstukken) II 2000/01, 27 469, no. 3, p. 4-6 and 9.14
The Directive applies to both private and public undertakings. According to the case law of the Court of Justice the latter term also includes government organizations. The Court of Justice gives a broad interpretation to the term “transfer”. An actual agreement or merger is not required for that purpose. Therefore, these two conditions do not usually impede application of the Directive.

However, the question as to whether public servants can be considered to be employees within the meaning of the Directive is a completely different matter. Article 2 (1d) of the Directive provides that employee shall mean any person who is protected as employee under national employment law. In the Collino & Chiappero/Telecom Italia SpA judgment the Court of Justice of the EC ruled, put briefly, that persons who are subject to a public-law statute cannot be deemed employees within the meaning of the Directive. The national court must determine whether this is the case.

The Dutch legislator has inferred from this decision that public servants do not enjoy the same protection as employees, as public servants are governed by a public-law statute, namely the Public Service Act and other laws and secondary regulations that specifically apply to public servants.

Also in the legal literature it is generally assumed that the legislator is not obliged to make an arrangement for public servants comparable to Section 7:662 et seq. of the Civil Code. There is no case law of or national courts dealing explicitly on this subject.

But it seems safe to say that the Directive does not apply to public servants.

The forgoing can mean that, in the case of privatization of a government organization at which both persons on short-term employment contracts and public servants are employed, the persons on short-term employment contracts will be obligatorily transferred with the undertaking and will retain their employment-law related rights and obligations whereas the public servants will not.

In the case of privatization the public authority will set, in practice, for the transferee employer certain requirements in respect of the employment conditions, of which the starting point will often be that the public servants are transferred with the undertaking and retain, as far as possible, their rights in substance, albeit in a legal relationship under private law. However, this has no legal basis and is usually laid down in a social statute.

Public servants cannot, for that matter, be automatically dismissed in the case of privatization of a government organization. The various legal position regulations provide that dismissal can be given due to abolishment of a position or a change in the organization of the service division (and this includes privatization) only if, after careful study, redeployment of the public servant within the public sector has not proved to be possible. A period of eighteen months is usually set for this.
Questions:

What are the consequences of privatization of public companies and, or public functions regarding the parties rights in labour relations?

If no redundancy plan has been agreed and a redeployment study has not resulted in redeployment, then privatization ultimately leads to dismissal of the public servant. They do not enjoy the protection that “normal employees” enjoy under the European rules pertaining to the transfer of undertaking that have been implemented into the Dutch laws and regulations.

What are the consequences of the change of legal structures of a private enterprise regarding the parties rights in labour relations?

In the case of employees employed on the basis of a civil-law employment contract, all rights and obligations of the transferor employer are transferred to the transferee employer pursuant to Section 7:622 et seq. of the Civil Code. Therefore, for the employee the situation under labour law remains the same.

1. Are public entities in your Country, or public functions within them, facing a phenomenon of privatizations? Is it possible to quantify it? Did the legislator in your country provide for any kind of legal restriction?

There has been a decline in the number of privatizations occurring in the Netherlands. In the past years a few privatizations have taken place, in particular in the public utilities and public transport sectors. A large wave of privatizations is not probable within the near future.

2. Has your country a specific set of rules concerning change in legal structures of public or private companies?

See the introduction. Such rules do exist for employees employed on the basis of a legal relationship under private law but do not exist for public servants.

3. In the affirmative, please describe the conditions for the application of such rules and their consequences in the relationships between the employer and the workers.
   - specify in detail the obligations to be met by the employer before or at the moment when a change in the legal structure of his company occurs
   - which are the legal mechanisms that assure in your country the maintenance of workers’ rights, especially those granted by collective agreements, face to the criteria of maximum profitability pursued with such type of structural changes?
   - which are the consequences that must be faced by a worker who refuses to work for the “new employer”?
   - did your country restrain the personnel’s right to use collective actions against a structural change?

See the introduction. In the case of employees all rights and obligations, including those arising from a collective labour agreement, are transferred pursuant to the law on transfer of undertaking. In the case of public servants, the rights arising under the legal position regulations applicable to them are not automatically transferred and will usually be regulated,
for the most part, in the agreements between the transferor public authority and the transferee private-law undertaking and in a redundancy plan. The employee who does not wish to transfer to the new employer will in principle have to submit his/her resignation. The public servant who, in spite of a non-statutory regulation enabling him/her to transfer with the undertaking, does not wish to transfer to the new employer, runs the risk of being ultimately faced with dismissal. In the Netherlands there are no special provisions that deviate from the ordinary right of collective action and restrict collective action on transfer of undertaking.

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